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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 18.10.2016

% PRONOUNCED ON: 21.12.2016

\+ ITA 159 & 326/2010

COMMISSIONER OF INCOME TAX DELHI IV..... Appellant
Through: Mr. Dileep Shivpuri, Sr. Standing Counsel with Mr. Sanjay Kumar, Jr. Standing Counsel and Mr. Vikrant A. Maheshwari, Advocates, in both appeals.

versus

DLF UNIVERSAL LTD. ..... Respondent
Through: Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates, in both appeals.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. The questions of law framed in these two appeals are as follows: -

> 1. Whether the Income Tax Appellate Tribunal was correct in law in setting aside the Commissioner of Income Tax (Appeals) order wherein it was held that the method of accounting followed by the assessee in the past and accepted in earlier assessment years is such that correct income cannot be properly detected from the accounts and the Assessing Officer was justified in invoking the provisions of First Proviso to Section 145(1) of the Income Tax Act, 1961?
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> 2. Whether the Income Tax Appellate Tribunal was correct in

law in holding that sale price in respect of constructed/built up properties should not be accounted for at the time of handing over the possession or conveyancing whichever is earlier?

3. Whether the Assessing Officer and the Commissioner of Income Tax (Appeals) were correct in law in re-working the cost of land at the average purchase price of land in Qutub Enclave Complex now known as DLF city by dividing the cost of the acquired till the end of the year by saleable area including lands earmarked for schools, hospitals, clubs and other community building, in each phase?

2. Both these appeals concern assessment years 1994-95 and arise out of the order of the Income Tax Appellate Tribunal (ITAT), allowing the appeals before it. The assessee which develops lands into plots and sells them, declared an income of ₹8,59,28,760/- in its return dated 30.11.1994. This was processed on 28.03.1995. Later it filed a revised return on 3.10.1996 declaring a loss of ₹93,39,470/-. The original assessment under Section 143 (3) was made on 31.03.1997 by which the income was assessed at ₹18,97,84,160/- by estimating the income @ 12.5% of the installments received by the assessee against booking of plots. The order of the Assessing Officer (AO) was set aside by the CIT (A), and the AO was directed to re-compute the assessee's income by recasting the trading and profit and loss account through method indicated, i.e., division of total expenditure by number of units in each phase in terms of the layout plan and charging of proportionate development expenses to the profit and loss account - depending upon the number of units of each phase sold during the year, the sale proceeds whereof were credited to the profit and loss account in that year. This pertained to the internal development

expenses. The CIT (A) also directed that the method of realizing revenue or debiting the cost of goods or valuing the stock or determination of certain expenses was not correct. The AO ought to have proceeded to re-compute the income after rectifying the defects rather than rejecting the accounts altogether. The AO was directed, therefore, to make necessary adjustments to the profit and loss accounts in respect of different issues in terms of the discussion. The revenue and the assessee appealed against the CIT (A)'s order. On 06.06.2008, the ITAT allowed the appeals by the assessee. The second appeal relates to the order of the ITAT, which set aside the CIT (A)'s order, after the appeal effect had been given to the assessment, on remand the first time. The AO had added some amounts, during the pendency of assessee's appeals to the ITAT; that order was affirmed. The ITAT, having regard to its previous findings, set aside the CIT (A's) order with respect to the method of accounting and certain additions made.

3. The assessee's deals in real estate, its acquisition, development in various projects through layouts and sale of developed lands and flats. Its acquisition is through subsidiary companies that in turn purchase lands from agriculturists. The assessee directly purchases only a small part of the total lands itself in view of certain legal impediments. The acquisition of land, therefore, is through its 40 fully owned subsidiary companies, which acquire lands in their own right. The subsidiaries are funded for the purposes of such acquisition. Both the assessee and the subsidiaries obtain licenses from the Haryana Government for development of land. The subsidiaries do not develop the land but have entered into agreements to sell them only to the

assessee company or their nominees at specified rates. The rate specified is the cost of land plus a markup of ₹2000/- per acre. The right to develop the land in terms of the licenses and the right to enter into agreements to sell the land or interests thereon have been given by the subsidiary companies to the assessee through separate agreements. The subsidiary companies' returns, are at a fixed rate of ₹2000/- per acre. The assessee appropriates the rest of the amounts collected from the prospective buyers of the developed land.

Question nos.1&2

4. The assessee used to advertise its schemes and after receipt of forms, the plots or constructed residential units/flats or commercial flats were sold to various prospective buyers each of whom entered into an agreement to pay the consideration of the plot or residential/commercial unit. The assessee showed these installments as receipts credited to *"realization under agreement to sell"* advance from the customer's account till the property was conveyanced in favour of the prospective buyers. At the time of conveyancing of the land to the prospective buyers, the subsidiary companies write off the property from their closing stock. The AO noticed that the assessee followed the mercantile system of account and was of the opinion that the assessee was following the project completion method. This involved transfer from the advance account and crediting to the profit and loss account the sums of money received from the prospective purchasers. All direct expenses incurred on development of land and construction were debited proportionately to the profit and loss account only in the year of conveyancing by taking the average cost of the land. The development expenses were debited @ 30% of the total

sale consideration. All other expenses such as interest payment, advertisement, brokerage expenses etc. were debited to the account in the year they were actually incurred. The AO found fault with this method of accounting and felt that the assessee should have followed the "substantial completion of projects" method of accounting in respect of its transactions. This was because the assessee claimed substantial expenditure and debited them from the profit and loss account but corresponding sales were not declared in the credit side of the trading account. It was noticed that there was no cancellation clause in the sale agreement for non-execution of the sale deed within the time nor was there any penalty clause for non-execution of the sale deed on deposit of the basic sale price. Therefore, the AO felt that it was not possible to arrive at a true profit and applied proviso to Section 145 (1) of the Income Tax Act, 1961 to reject the method of accounting.

5. In the first instance, the CIT (A) upheld the order of the AO by his previous order of 30.01.1998. The appellate Commissioner held that the expression *"method of accounting"* under Section 145 was wide enough to include not only the two recognized systems of accounting, i.e., cash and mercantile but all such methods employed by the assessee that have direct or indirect bearing on the working of the profits. It was reasoned that the assessee's business, i.e., township development is different from that of a contractor or one assessed for construction activity. The peculiar feature of this business is that it is an open ended ongoing project and the completion of one project or the other is not conclusive because other phases of the project - even multiple might continue. The CIT (A) felt that it could be said that

income accrues on a date earlier than when it is received, but it could be difficult to state whether income or amounts received earlier would accrue later. Noticing the peculiarities of the agreement to sell entered into between the plot/flat buyers and the assessee, the CIT (A) felt that in the absence of a penalty clause in the event of delay by the assessee or the absence of a cancellation and forfeiture condition, and furthermore there being practically no instance of termination of agreements, the agreements themselves effectively conveyed the property. The CIT (A) relied upon the decisions of the ITAT as well as the Supreme Court in *CIT v. Podar Cement (Pvt.) Ltd.*, (1997) 226 ITR 625 and held that even without a conveyance deed, there was in effect transfer of lands. The CIT (A) directed re-computation of the assessee's income in the light of the adjustments to be made in terms of the directions in paragraph 27 of its order. Those directions are extracted below: -

> *"27. In the light of the foregoing discussion, I find that there are certain material defects in the method of accounting employed by the appellant which leads to distortion of the real profit. It is not possible to deduce the profit from the method of accounting so deployed in any year of account. Hence, the A.O. has rightly invoked the provisions contained in the proviso to section 145 (1) of the Act. However, the appellant ahs regularly employed this method. It is not the case of the A.O. that the books of accounts are not correct or complete. It would, therefore, not be correct to reject the books of accounts altogether and resort to estimation of profit in the manner done by the A.O. If the method of realizing the revenues or debiting the cost of goods or valuing the stock or determination of certain expenses is not correct, the A.O. should proceed to compute the income after rectifying such defects. The application of net profit rate should be resorted to only if there is no other way of arising at the profit of the assessee. Besides,*

in the present case, the A.O. has no rational basis for applying a net profit rate of 12.5% on the value of installments received during a year. He has referred to the case of M/s Unitech Ltd. But in the said case the rate is applied to arrive at the gross profit and estimation is subject to final accounting on the completion of the project. The A.O. has drawn support from the case of S.P. Viz construction CO reported in 163 ITR 666 which was the case of a contractor and not of a colonizer or a developer or a dealer in real estate. The net profit rate of 12.5% is purely adhoc and arbitrary and has no rational basis. It is possible in the present case to work out the profits of the appellant after rectifying the defects in the accounts and by making the necessary changes in the profit and loss account. Thus the action of the A.O. in completely disregarding the books of account and applying a flat net profit rate cannot be upheld. The A.O. should, therefore, make necessary changes in the profit and loss account in respect of different issues as per the guidelines discussed herein below.

(I) The discussion made in the preceding paragraphs with regard to the realization of revenues in respect of sale of plots of land at the time of conveyancing clearly shows that the method is not correct and defers the accrual of income. However, this method has been employed since the very beginning of the QE complex. The assessments have also been completed on the same basis. By now 90% of the plots of land have already been conveyanced and the sale proceeds credited to the profit and loss account. If any alternation in the method of accounting is made by the A.O. at this stage, it may unsettle a large number of assessments and may result in certain income getting doubly taxed or not taxed altogether. Looking to entirety of facts and circumstances it would be fair both to the assessee as also the Revenue to let the method of accounting continue for the remaining part of the project despite certain distortions as stated above as far as plots of land are concerned.

(II) As regards the constructed properties, the method of accounting was changed by the appellant in the recent past. The possession of the property is handed over to the buyers on

payment of at least 40% of the sale price and the balance amount is payable in installments under the Deferred plan for which the appellant is charging interest from them. The buyers become the beneficial owners of these properties under the circumstances and for the reasons discussed above. The appellant's right to the full realization of sale consideration accrues at the time the possession is handed over and from then onwards for all purposes, the buyers are only debtors of the appellant for the remaining amount of installments. Thus in respect of constructed properties, the sales should be taken to the profit and loss account in the year in which the possession is handed over to the buyers if the sale is made under a deferred payment plan. In respect of properties sold against outright payment, the sales should be credited to the accounts in the year in which possession is handed over or the year in which the conveyancing is done whichever is earlier.

(III) As regards the cost of land, average purchase price of each phase should be worked out. Phases I, II, III were started at the same point of time. Phase IV was started much later and phase V still later. The total cost of lands falling in each phase (Phase I, II & III may be regarded as one phase for this purpose) should be worked out and the cost so arrived at should be divided by the total saleable area in each phase as per the approved layout plan. This will give the average purchase price of land for each phase. In respect of multi-storeyed building, the average cost of land utilized for the construction of the building may have to be further divided by the number of units in the building. The average cost of land to be debited to the profit and loss account in any given year should be determined on the basis of the area of plots of land/constructed units of each phase sold during the year, (the sale proceeds whereof are credited to the profit loss account in that year) and the total cost of land of each phase.

(IV) For arriving at the value of closing stock of land, only the land utilized for roads, parks etc. should be written off proportionately at the time of sale of land or constructed properties. The land earmarked for schools, hospitals, clubs or other community buildings should be written off only in the year

in which such land is transferred to third parties. For the year under appeal, such land (except 5 sites retained by the company) should neither appear in the closing stock nor in the opening stock as it stood transferred long back to the Govt or to the trusts. However, the sites which have been retained by the appellant will continue to be shown in the closing stock. The value of such lands till these remain in the closing stock will have to be determined in accordance with the method of valuation adopted by the appellant. It may be pointed out that the market value of these sites cannot be zero. These are capable of getting premium as seen in respect of 42 sites transferred to different individuals/institutions through the medium of trust. The AO should obtain a yearly stock inventory of the land acquired by the assessee in various phases, rate at which acquired, area acquired and also the details of land conveyance out of the acquisition.

(V) The internal development expenses should be debited to the profit and loss account on the basis of actual expenditure. By the time the sale proceeds are credited to the profit and loss account, the development work is already over and the actual expenditure on the development of each phase is known. The question of estimating such expenses may arise when these expenses are required to be charged before the actual execution of the work. Such an eventuality would have arisen if the profits were to be worked out before the completion of the project. In the present case the revenues are being realized only at the time of conveyancing and in any case after the completion of the project or sub-project. There should not be any difficulty in finding out the total amount of internal development expenses on each phase. The total amount of expenditure should be divided by the number of units in each phase as per the layout plan. The proportionate development expenses should be charged to the profit & loss accounts depending upon the number of units of each phase sold during the year (the sale proceeds whereof are credited to the profit and loss account in that year). It was very seriously contended that the appellant has to incur a large amount of expenditure even after the sale of plots/flats. I do not find any difficulty in this regard. If the assessee incurs any further expenditure in future in the said

phase the same can always be claimed against the similar receipts to be credited in future. The expenses can be claimed even if there are no receipts in any particular year.

(VI) The A.O. is directed to recompute the income of the appellant company after making the above adjustments and by recasting the trading and profit and loss account. The assessment is accordingly set aside for recomputation of income by the A.O. The A.O. will, however, provide adequate opportunity to the appellant in this regard."

6. The ITAT accepted the assessee's appeal but rejected the revenue's appeal on other issues and held as follows: -

"Now coming back to the first issue raised by the AO and accepted by the CIT (A), it is with regard to the fact whether the assessee should not have treated Phases I to IV as one project for purposes of application of project completion method. The CIT (A) has opined that Phases I, II and III should be treated as one complex and Phase IV should be treated separately. This is for the reason, as per CIT (A) and the AO, that Phase IV could go on indefinitely and this could lead to reduction in profits because the purchase of land subsequently would be at the higher rates vis-à-vis the rate at which the land was purchased earlier at lower rates. As explained before, the appellant assessee follows the project completion method whereunder all its costs are capitalized to work-in-progress, including the purchase of land – whether it is purchased at earlier point of time or later point of time. So, there is no dispute between the appellant assessee and the Department that its work-in-progress has been properly reflected in its books of accounts. The issue that has been raised is that when the assessee books a sale on registration of the sale deed, then its credits work-in-progress by the average cost of land on the date of sale and debits its profit & loss account by the same amount. In principle, both the AO and CIT (A), as well as, the learned DR agree with this method; the only variation they are proposing is that average should be in respect of Phases, I, II and III, not including therein Phase IV, whereas, as per books of accounts maintained by the assessee from 1981 to 1993-94, the assessee

is doing it in respect of all the four Phases, i.e., principally, the methodology is not under dispute. The only variation that is being pressed is in the exact working thereof. The criteria adopted by the Ld. CIT (A) is not justified. Firstly, the entire area under phase I to IV has been considered by the HUDA authorities as one single project, in terms of sanction given as per their letter. Secondly, the extent of the area to be held for benefit of the community like school, hospital, fire station, parks, police station etc. are to be set apart from the entire land of Phase I to IV jointly and not phase wise. Thus the cost of land in phase I to IV have to be aggregated by pooling all these lands together. This justifies the action of the assessee in allocating the cost of entire land in phase I to IV by pooling them together. On the contrary, there is no justification for excluding the cost of phase IV alone without any intelligible criteria for the same. There is no intelligible criteria for making this change. Ultimately, profit and loss even out over a period of time and life of the project. This tinkering with the books of accounts does not result in any gain to the Revenue as it only reduces profit in one year and increases in the other year and as observed by the CIT (A), most of the sales in these four Phase have been completed. Therefore, over the period of life of this colonization, this variation being proposed by the AO and the CIT (A) does not serve the purpose of the Revenue and this should not have been tinkered with. The finding by Ld. CIT (A) in this regard is incorrect for the reasons stated in this paragraph, especially in view of the fact that Haryana Urban Development Authority has also treated these four Phases as one as mentioned at pages 212 to 215 of the Paper Book."

7. After the remand, in the meanwhile, the AO had completed the assessment pursuant to the directions of the CIT (A). Now, this exercise was rendered entirely academic in view of the later decision of the ITAT, which was, however, rendered on 6.6.2008. This assessment order after working out the remit, even as per the previous order of the CIT (A), determined the net profit as per profit and loss

account @ ₹2,74,36,834/-. The total taxable income was determined to be ₹2,38,11,766/-. The CIT (A)'s order on this aspect was of 30.05.2001. The assessee had to appeal against that order because its previous appeal against the first assessment order was still pending.

8. In the order impugned in these appeals, the ITAT reiterated its decision of 06.06.2008 and held that rejection of the assessee's method of accounting was not justified.

9. Mr. Dileep Shivpuri, learned counsel for the revenue urges that the impugned order is unsustainable. It is stated that the assessee's method of accounting in effect postpones the profit which is not permissible in law and besides results in prejudice to the revenue. The method of accounting did not truly and accurately reflect the picture of profit earned by the assessee. It is highlighted that the assessee changed its method of accounting in assessment year 1992-93 before which it was in fact followings the project completion method and claiming development expenses as part of work in progress. This method of accounting was changed by the assessee, which offered sales on the basis of conveyances. By this revised method, the assessee did not offer a portion of sales consideration in the year of its receipt claiming that provisions for development expenses was made inspite of the fact that those expenses were not incurred in the year under consideration.

10. Mr. Shivpuri submitted that 30% appropriated towards development as expenses could not be in fact done on a uniform pattern across the board given that development of the individual plots was never undertaken at one go and was in fact on project to project and layout to layout basis. In fact, no supporting evidence was offered

to show such expenditure. Likewise, appropriation of the entire brokerage and sales commission to the expenses, as debited, though the conveyance of the property was much later, also showed that there was no consistent pattern in the accounting behaviour of the assessee. Learned counsel relied upon Section 2 (47) of the Income Tax Act, 1961 and Section 53 (A) and submitted that transfer is not evidenced only by conveyancing but in fact also by possession which is a recognized mode under income tax law as well as general civil law of the land. He relied upon the decision of the Supreme Court in *Mysore Minerals Ltd. v. Commissioner of Income Tax*, 234 ITR 775.

11. Mr. Ajay Vohra, learned senior counsel for the assessee submitted that questions sought to be urged should be answered against the revenue. He placed heavy reliance upon the ITAT's decision dated 06.06.2008 and submitted that the method of accounting as well as the appropriation of expenses towards development etc. were directly in issue and in fact accepted. It is urged that the State Government treated all phases or stages of the assessee's project as one development unit or colony, though the assessee developed them in different phases on specific timelines. The license and approval received by it on 26.07.1994 clearly showed that it was one unit. It was submitted further that 51 sites were earmarked as community sites to be handed over to the Haryana Urban Development Authority (HUDA) which was also contained in Annexure and that details of taking over of such sites in the four phases were also mentioned. Colonization is a highly regulated activity involving a large number of cheques and balances. HUDA monitored every receipt by the assessee; 30% of the amounts received

had to be deposited in a special bank account to meet the internal development expenses. This account is under the control of the Director, Town and Country Planning, Haryana, copies of these documents were produced before the AO and the other revenue authorities. These documents also indicated that 50% of the amounts received from the plot holders were kept in a separate account under the control of the Director, Town and Country Planning, Haryana. This was later reduced to 30% in the assessee's case - a fact noticed by the CIT (A). The account in turn was subjected to audit. If the assessee violated any terms of the Act, its license to colonize could be cancelled under Rule 8 of the Regulations.

12. It is pointed out that the findings of the ITAT on the question of adopting the method of accounting are conclusive and that since the revenue did not prefer any appeal against those findings which were not a matter of remand but rather set aside the second assessment order and the second order of the CIT (A), nothing survived. In this regard, the order of the ITAT dated 06.06.2008 deals with the question of method of accounting and holds as follows: -

> *"Now coming back to the first issue raised by the AO and accepted by the CIT (A), it is with regard to the fact whether the assessee should not have treated Phases I to IV as one project for purposes of application of project completion method. The CIT (A) has opined that Phases I, II and III should be treated as one complex and Phase IV should be treated separately. This is for the reason, as per CIT (A) and the AO, that Phase IV could go on indefinitely and this could lead to reduction in profits because the purchase of land subsequently would be at the higher rates vis-à-vis the rate at which the land was purchased earlier at lower rates. As explained before, the appellant assessee follows the project completion method whereunder all its costs are capitalized to work-in-progress, including the*

purchase of land – whether it is purchased at earlier point of time or later point of time. So, there is no dispute between the appellant assessee and the Department that its work-in-progress has been properly reflected in its books of accounts. The issue that has been raised is that when the assessee books a sale on registration of the sale deed, then its credits work-in-progress by the average cost of land on the date of sale and debits its profit & loss account by the same amount. In principle, both the AO and CIT (A), as well as, the learned DR agree with this method; the only variation they are proposing is that average should be in respect of Phases, I, II and III, not including therein Phase IV, whereas, as per books of accounts maintained by the assessee from 1981 to 1993-94, the assessee is doing it in respect of all the four Phases, i.e., principally, the methodology is not under dispute. The only variation that is being pressed is in the exact working thereof. The criteria adopted by the Ld. CIT (A) is not justified. Firstly, the entire area under phase I to IV has been considered by the HUDA authorities as one single project, in terms of sanction given as per their letter. Secondly, the extent of the area to be held for benefit of the community like school, hospital, fire station, parks, police station etc. are to be set apart from the entire land of Phase I to IV jointly and not phase wise. Thus the cost of land in phase I to IV have to be aggregated by pooling all these lands together. This justifies the action of the assessee in allocating the cost of entire land in phase I to IV by pooling them together. On the contrary, there is no justification for excluding the cost of phase IV alone without any intelligible criteria for the same. There is no intelligible criteria for making this change. Ultimately, profit and loss even out over a period of time and life of the project. This tinkering with the books of accounts does not result in any gain to the Revenue as it only reduces profit in one year and increases in the other year and as observed by the CIT (A), most of the sales in these four Phase have been completed. Therefore, over the period of life of this colonization, this variation being proposed by the AO and the CIT (A) does not serve the purpose of the Revenue and this should not have been tinkered with. The finding by Ld. CIT (A) in this regard is incorrect for the reasons stated in this paragraph, especially in view of the fact that Haryana Urban

Development Authority has also treated these four Phases as one as mentioned at pages 212 to 215 of the Paper Book."

13. It is evident from the above discussion that the assessee followed the project completion method. This Court has in its decision in *Paras Buildtech India P. Ltd. v. Commissioner of Income Tax*, (2016) 382 ITR 630 (Delhi) held that the project completion method is a known and recognized mode of accounting. It is also held that this mode was approved as a proper method, which identified receipt of income or revenue only upon the completion of the contract. This Court relied upon the judgment of the Supreme Court in *CIT v. Bilahari Investment P. Ltd*. [2008] 299 ITR 1 (SC) where both the methods of accounting were specified and which stated *inter alia* as follows: -

> *"Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the percentage of completion method is another such method.*
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> *Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.*
>
> *On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under the method determined by reference to*

> *the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.*
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> *The above indicates the difference between the completed contract method and the percentage of completion method."*

14. Proceeding to analyze the facts before it in *Paras Buildtech (supra)*, the ITAT's decision that risks and rewards' of ownership was transferred to the buyers upon payment of booking advance amounts and even transferred to third parties was a ground for rejection, was disapproved. It was noted that these instances did not in any manner affect the treatment of the said amounts in the books of the Assessee.

15. This Court is of the opinion that the above decision in *Paras Buildtech (supra)* concludes the issue against the revenue. Besides, the change in the accounting method in 1992-93 *ipso facto* could not have resulted in loss of revenue as is urged by the tax authorities in the present case. The distortions, which the revenue urges relate to the treatment of development charges as well as the treatment of expenditures such as brokerage, commission and interest payments. The assessee's explanation here is that the 30% of the sums realized by it were under compulsion of law to be treated as development expenses and kept in a separate escrow account under the control of the HUDA. The revenue has not disputed this position. In that sense, the assessee was justified by statute to appropriate the sums towards development expenses. So far as the treatment of revenue with respect to brokerage and interest payments is concerned, the assessee again

has an explanation, which is a rational one: i.e., that only such of the expenses attributable to the agreement with the purchasers was debited as expenditure. So far as the question of applicability to section 2 (47) of the Act or Section 53(A) of the Transfer of Property Act is concerned, legally speaking, part performance is undoubtedly an interest or right known to law. However, part performance, pre-supposes handing over a possession, at the time the agreement is entered into. Having regard to the assessee's uniform pattern of revenue recognition that only upon execution of the conveyance/sale-deed, would the amounts lying with it be treated as profit and brought to tax, the possibility that in law certain flat or plot buyers could be handed over possession earlier *per se* would not result in distortion of the kind stated by the revenue. There is no material or evidence in this regard nor was cited by the revenue.

16. This Court is furthermore of the opinion most importantly that in the previous order of the Tribunal dated 06.06.2008 on the justification by the assessee in following the project completion method (in ITA 1884/Del/1998 and 2052/Del/1998- *DLF Universal v. ACIT*), which became conclusive, the revenue could not have urged all over again this aspect. For the forgoing reasons, the findings on this question are in favour of the assessee. Question nos.1 and 2 are answered in favour of the assessee and against the revenue.

Re Question No. 3

17. On this question, the court notices that even after the first remand, the AO had in fact verified and granted relief, which was upheld by the CIT (A) in his order of 30.05.2001 (during the pendency of ITA 1884/Del/1998 before the ITAT leading to the present round).

It was held that:

> *"The issue has been discussed on p.6. of the assessment order. Qutab Enclave Complex developed by the appellant is located at Gurgaon and hence is covered by the rules of Haryana Government. As per Haryana Development and Regulations of Urban Land Area Rules, the appellant could sell only 55% of land and 45% of the land has to be left open to be utilized by roads, parks, schools, colleges, hospitals, clubs and community sites. On this basis, the Appellant is writing off 1000 sq. mtr. of land for the sale of 550 sq. mtr. My predecessor in his order for Assessment Year 1995-96 and' 1996-97 has discussed this issue in para 3.5 more elaborately and held as under:*
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> *"3.5 I have considered the matter in the Haryana Development and Regulation of Urban Area Rules, 1976, there is a difference in the treatment of land left for roads, open spaces, public parks' and public health services on the one hand, and the land reserved for schools, hospitals, community centres and other community buildings on the other hand. Rule 19 (2) (d) requires that the roads, open spaces, public parks and public health services shall be transferred to the Government or the local authority Within a period of five years after the completion of the colony. However, there is no such mandatory requirement of transfer in Rule 10(2)(e) which deals with the lands reserved for institutional buildings. In respect of institutional lands, there is only an obligation to transfer them to the Government, whenever desired by it, free of cost. There is no mandate that the Government shall do so. Till the Government takes over these lands, there is .no restriction on the use of these lands, except that they have to be used for the purposes for which they are reserved; and there is no bar on the appellant to derive profit from the use of these lands for the specified purposes. It is true that the appellant may not be able to sell these lands. But sale is just one of the several ways in which profit may be derived from land. Mere fact that the appellant is precluded from selling the land, or does not intend to do so does not imply that appellant has ceased to be its owner or that he cannot derive profit from it in other ways. Thus, it may be observed that the appellant continues to be the owner of the institutional sites, and he is not barred from deriving profit from*

tem by building and running schools and hospitals thereon. The acquisition of these sites by the Government is a contingency which may or may not arise. Hence, I agree with my learned 'predecessor that these sites should not be written off till they are actually acquired by the government, or are transferred 10 any other person or institution. For the same reasons, I hold that it would be proper to value these spaces at nil. as per the alternative argument put forth on behalf of the appellant. The argument that in case these sites are to be treated as property of the appellant then the projected cost of construction of these sites should be allowed as part of internal development cost, is also not valid, because even if the appellant incurs any expenditure on their construction, they will represent valuable assets in the hands of the appellant, and it will not be correct to change this cost to the internal development of the colony. Hence, for the purposes of income-tax assessment, these sites shall continue to form part of the stock-in-trade of the appellant at cost, until they are actually transferred It follows that the appellant shall be entitled to write off these site and charge their cost to the profit & loss account when they are actually transferred to the government or any other person or institution."

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Based on the above, my predecessor worked out the saleable area @ 60.77%.This issue also has also been adjudicated upon by me in appeal no. 82/200'0-2001 for Assessment Year 1997-98 and I have held that the salable area at 60.77% is correct. The appellant has filed a revised working of the land cost @ 60.77%which comes to Rs. 34,46,861/-. Since the Assessing Officer has allowed the land cost based on 62.84% at Rs. 32,74,405/-, the appellant will get a relief of Rs. 1,72,456/- on this account. The Assessing Officer is, therefore directed to give this relief to the appellant accordingly."

18. On this issue, factually, the ITAT had concluded as follows:

"The AO and the CIT(A) have attempted to go beyond the HDRUA Act and against the CIT(A)'sown finding contained at p.21, first paragraph and p.22; there is a contradiction in the

order of the CIT(A). The CIT(A) has himself recorded that out of 162 sites earmarked for schools, hospitals and clubs, 106 sites were transferred to charitable/educational and recreational trusts created by the appellant assessee as early as in the year 1988. Out of the balance, 51 sites were acquired by the Government of Haryana and only five sites have been retained by the appellant assessee. Some aspersions have been cast by CIT(A) at page 22 of his order, but the fact remains and which has also been' recorded by CIT (A) in his order is-"In any case, the settling of these sites on these trusts is a gratuitous act of the appellant". Once this finding of fact has been recorded by CIT (A) that the assessee has followed the HDRUA law, reproduced by him at p.20 and called out by him at p.21, Para 1,it is obvious that the appellant assessee has not taken any sum for transferring these sites i.e. this has been free of cost, either to the Govt. of Haryana or to the charitable trusts etc. After handing over these sites, the assessee's compliance of law comes to an end. The transferees i.e. the Govt. of Haryana and these charitable trusts have to follow the law. If they did not follow the law for any reason, whatsoever, then action could be taken by the authorities, but no such facts have been proved before us; though some allegations have been made against the transferees. Be a sit may, as far as the assessee is concerned, it has followed the law and no violation of the same has been done. Therefore, when the assessee writes off 45% of the land when it sells the land to any buyer, then it follows the law. From every 100 sq. yds of land that the assessee purchases, it is entitled to sell 55sq. yds. And, by law it has to keep 45% of land vacant or for community sites. As per record which we have carefully perused, this is what the assessee has done. Therefore, loading of cost of the vacant portion of the saleable portion is an automatic corollary of the law.CIT(A) has varied this figure to 60.77.% but ultimately the assessee cannot vary this percentage when the entire project comes to an end; it can never sell more that 55% of the area by any accounting jugglery or notional calculations. As contended by ld. AR that the assessee has followed the law consistently right from 1981 and no violation of the law has been pointed out by the authorities below or by the learned DR or by Haryana Urban Development Authority against the assessee. This position has also been accepted by the A.O. himself from assessment year 2003-04 to

assessment year 2005-06. So the result is that this was accepted in original assessments from 1981-82 to 1993-94 and has also now been accepted from 2003-04to 2005-06. It is only in the intervening 10 years that the variation has been proposed.' This, as submitted, would unnecessarily distort the profit & loss of the project; in some years there would be loss to the Revenue and in some years there would be loss to the assessee. But, overall it will get evened out. Variation in this kind of long-term project can never be made without keeping the full picture in mind, as it would only lead to more work and complications, with no real profit or gain to the Revenue."

19. It would thus be clear that the factual findings are against the revenue, which had clearly accepted the legal position interpreted by the ITAT as correct - evidenced by not filing an appeal on this question. Therefore, the revenue cannot be permitted to urge this as a grievance. In any case, this kind of treatment was permitted during all other years and there is no compelling *rationale* for the court to examine it – especially because the facts found point to a contrary picture. The question of law is therefore, answered against the revenue/appellant.

20. Since both questions of law have been answered against the revenue and in favour of the assessee, the appeals are to be dismissed; but with no orders as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

DECEMBER 21, 2016
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